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CASES CITED.

STATUTES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

FIDELITY & DEPOSIT COMPANY OF MARYland, appellant,

v.

THE UNITED STATES.

No. 207.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

I.

STATEMENT OF FACTS.

This is an appeal from a judgment of the Court of Claims in favor of the United States, arising from collection by it of a bankers' special tax for the four fiscal years ending June 30, 1902, under the provisions of the war revenue act approved June 13, 1898, ch. 448, 30 Stat. L. 448:

> That from and after July 1, 1898, a special tax shall be, and hereby is, imposed annually as follows, that is to say:
>
> Bankers *using or employing a capital* not exceeding the sum of twenty-five thousand

> dollars shall pay fifty dollars; *when using or employing a capital* exceeding twenty-five thousand dollars, for every additional thousand dollars in excess of twenty-five thousand dollars, two dollars, and *in estimating capital, surplus shall be included.*
>
> * * * * *
>
> Every * * * company * * * having a place of business where credits are opened by the deposit or collection of money * * * shall be a banker under this act * * * (Italics ours.)

Plaintiff conducted its business in its own office building in Baltimore, Md. Its business included (1) surety business, (2) banking business, (3) safe-deposit business, (4) acting as trustee upon bond issues by other corporations.

It had a capital stock and surplus ranging from $2,000,000 in 1898 to over $4,500,000 in 1901. A part of its capital was invested in its office building, which cost $600,000. A portion of this building was occupied by appellant in its banking business. That portion does not appear from the evidence. It conducted its banking business as a part of its other business. A part of this building was occupied by the safe-deposit business, but that portion does not appear from the evidence.

Its capital stock and surplus funds were permanently invested in real estate bonds and other securities. These investments were kept alone in a separate compartment in the company's vaults.

The bank's deposits run from over $2,500,000 in 1898 to over $4,500,000 in 1901. The profits from its banking business amounted to over $570,000 in the four years.

The business of the banking department was kept separate from appellant's other business. The money received from deposits was invested in stocks and bonds which were kept in separate compartments of the company's vaults.

The company's net earnings were carried to the undivided profits account at the end of each year. Part of the bank profits were carried as counter cash and the balance deposited in the company's various depositaries. The money so deposited was not segregated.

The company regularly made to the Commissioner of Internal Revenue a return of its capital and surplus which was assessed a total sum of $8,300 during the four years under the act of 1898, which sums were duly covered into the United States Treasury.

The company claims as a ground for refund that the taxes in question were assessed and collected on its capital and surplus which were not used or employed in the banking business.

The commissioner refused to refund said taxes.

The Government insists (1) that the surplus and capital were employed in the banking business as a basis thereof; (2) that the deposits were permanently invested in stocks, bonds, etc.; (3) that they were used as and became a part of the capital of the

company and thus employed in the banking business; (4) that the profits were not only used as counter cash but were placed in various depositaries where they were mingled with the company's other profits and subject to draft; that the evidence does not show that these profits were not thus used in the banking business; (5) that section 3227 of the Revised Statutes, which provides that all actions with reference to taxes must be brought within two years from the time the right of action accrues, is a bar to this action; (6) that section 5, chapter 140, 38 Stat. L. 996—

> Nor shall said Court of Claims have jurisdiction of any claim which is now barred by the provisions of any law of the United States—

constitutes and is a complete defense to this action.

II.

THE ISSUES.

1.

For the purpose of the tax, was the appellant a banker within the meaning of section 2, c. 448, act of June 13, 1898?

2.

Did the plaintiff, during the taxing period, use or employ a capital as a banker?

3.

Is the action barred by limitations?

III.

THE ARGUMENT.

1.

For the purpose of the tax, was appellant a banker within the meaning of section 2, c. 448, act of June 13, 1898?

As this is admitted we will not discuss it.

2.

The plaintiff used and employed a capital during the taxing period as a banker.

The business of appellant was conducted in its own office building, valued by appellant at $600,000. The business which it conducted was of the following character: First, surety business—that is, acting as surety upon bonds conditioned for the faithful performance of duties by principals; second, banking business—that is, receiving money upon deposit subject to be paid or remitted on check, draft, or order, advancing and loaning money upon stocks and bonds and also receiving commercial paper for collection for its depositors; third, safe deposit business—that is, renting safe-deposit boxes for the safekeeping of valuables; fourth, acting as trustee upon bond issues by other corporations. The surety business was plaintiff's chief business, and the next to this in volume and production of income was its banking business. The moneys which it received on deposit during the years in question, and about

which there is no dispute, were found by the Court of Claims as follows:

For the year ending:

June 30, 1898	$2, 632, 625. 66
1899	3, 173, 017. 39
1900	3, 739, 275. 47
1901	4, 139, 675. 55

A part of the money received on deposit was invested, and securities representing that amount were put in separate packages marked "I. D." and "E. D.," meaning, respectively, "individual" and "estate" deposits, and were placed in a separate compartment of appellant's vault. The interest or income derived from the securities representing the said moneys received on deposit was utilized, first, to pay interest upon the deposits, and the balance was, like plaintiff's other income, carried into the profits and loss or undivided profits account, commingled with appellant's other cash and placed in its depositories.

Securities representing the investment of much of plaintiff's capital assets were kept in separate packages marked "C. S.," meaning capital stock, and were placed in the same vault with its other securities above mentioned, representing the deposits, but in a separate compartment. These capital assets were listed in an account which plaintiff's witness designated as "capital investment," "capital stock," or "capital stock department." In this account there was included plaintiff's capital, surplus, undivided

profits, premium reserves, net profits, etc. It will be seen from this, and it is not shown to the contrary, *that plaintiff's entire capital was held as a basis for the operation of all of its departments*, and there is no designation or segregation of what part of capital and surplus is held and employed in the operation of (1) trust surety, (2) banking, (3) safe deposit, (4) trustee department.

Plaintiff's banking business was conducted along with its other business in the same office building, which represented a part of its capital, and, so far as the proof shows, with the same officers and employees. The expenses incident to the conduct of the banking business were paid out of the undivided profits of the company in the same manner in which its other operating expenses were paid. The proportion or amount of the office building which was used or employed in the banking business is not disclosed by the evidence. The taxes which plaintiff paid for the years here involved were not upon its entire capital and surplus, nor upon its entire capital stock and surplus, but appears from the evidence introduced, and so found as a fact by the Court of Claims, to be collected only upon less than one-half of the total amount of its capital stock and surplus.

In each of the years in question appellant was required by and regularly and duly made to the Commissioner of Internal Revenue a return of its capital and surplus, upon which there was assessed against and collected from plaintiff the total sum of $8,300

as special bankers' taxes under section 2 of the act of June 13, 1898.

The amount of capital and surplus which plaintiff reported to the Commissioner of Internal Revenue in making its return for assessment does not appear from the evidence, nor does it appear why plaintiff was not taxed upon the entire amount of its capital and surplus. It is clear from the amount of the taxes that appellant was not taxed upon its entire capital and surplus, nor upon its entire amount of capital stock and surplus, but upon less than 50 per cent of the capital stock and surplus. Thus it would appear that appellant had conceded that less than one-half of its capital stock and surplus or some portion of its capital had been used and employed in the banking business, and that the tax thereon was properly due and payable. It made no protest in the payment of these taxes and no effort to have them refunded until a claim was presented by Messrs. Lyon & Lyon, attorneys, on November 22, 1913, which claim was rejected by the Commissioner of Internal Revenue on or about April 16, 1917, and this suit brought July 25, 1918.

The theory on which appellant seeks to recover the taxes, and the only evidence offered to sustain their theory, is that securities representing the investment of much of plaintiff's capital assets were kept in a separate package marked "C. S.," meaning capital stock, and were placed in the same vault with its other securities, above mentioned, repre-

senting the deposits, but in a separate compartment. These capital assets were listed in an account designated as "capital investment." It is insisted on behalf of the appellee that there is nothing in this to show that the capital, though much of it was invested, was not used and employed in banking. Appellant had a capital on which it conducted its business, including that of banking, and its capital was as much available for banking as any other of its departments, and just as available for use when needed or desired. The employing of capital does not necessarily mean an actual use of it, but rather the having it available for use when and as needed or desirable. *Union Trust Co. of Indianapolis* v. *United States*, 55 Ct. Cls. 424.

Certainly, so far as the public was concerned, with whom appellant was dealing as a banker, it held out the fact that it had a capital and surplus, and upon the strength of that capital and surplus it invited the public to do business with it as a banker and did business with the public as a banker. It was certainly employing its capital in banking. The appellant, relying entirely on the proposition that no part of its capital or surplus was used or employed as a banker, because and for the reason that much of its capital was invested in securities, has completely failed to make out a case for the recovery of the tax; for the fact that plaintiff kept several packages of securities in separate compartments of its vault and marked each package as here-

tofore indicated would not determine, and is not proof, that one bundle of securities represented capital any more than the other; nor would it prove that appellant's capital was not used or employed in the banking business. When appellant received deposits, the money so received became its property and it did not act as trustee for such funds deposited. The relation of debtor and creditor was established between the bank and the depositors. This rule is too well settled to require citation of authorities. Any and all of plaintiff's assets, whether cash or securities, in which capital is invested were liable to the claims of the depositors, and plaintiff could not put certain securities, secured with the profits from the bank deposits, aside in a vault and say "We will make them assets or capital for use in the banking business, and the depositors are limited to them in satisfaction of their claims"; nor could they say "We will put aside in another compartment of the same vault certain other securities constituting the greater part of our capital and surplus, and the depositors shall have no right to them—we have marked them in a certain way and we say they are not used or employed in the banking business." A careful analysis, however, of the evidence shows that this is practically all there is to the alleged segregation and nonuse or employment of capital. The defendant insists that the capital assets in the form and manner held were as applicable to and employed as much in the banking business as in any other business conducted by appellant.

A.

THE AUTHORITIES.

The court held in *Canal & Banking Co.* v. *New Orleans*, 99 U. S. 97, at pages 98 and 99:

> * * * Now, does it lie with the bank to put its finger on a particular item of assets—its money on hand, for example (which appears to have consisted of legal tender)—and say that this item and no other item constituted its capital at that time? Does this depend upon the mere option of the bank? Why was not its cash on hand just as applicable to its deposits and other obligations as to its capital? Not a particle of proof was offered and it is difficult to see how any proof could have been offered to show that the cash exclusively constituted capital.
>
> * * * Can it be pretended that the cash on hand was the simple and only representative of that capital? Suppose that this cash had come to the bank from its depositors—and it is not shown to the contrary—would it be admissible then to say that it constituted its capital? In this suit the burden of proof is on the bank to show that it has been unlawfully taxed. The taxes of the assessor must stand unless it can be affirmatively controverted.

In the case of *Anderson* v. *Farmers Loan & Trust Co.*, 241 Fed. 322–324, referring to an alleged segregation of capital, the court said:

> No segregation took place, and the attempted segregation was an artificial transaction that

> in our opinion had no reality. The statute upon any other theory becomes futile and meaningless, and enables any bank holding investments equivalent in value to its capital, surplus, and undivided profits exempt from any franchise tax under the war revenue act.

Certainly the capital and surplus of plaintiff was employed, if not used, in banking, and plaintiff has not only failed to support the burden of proof which is upon it, but the evidence discloses affirmatively, we believe, that the capital was used and employed as much in banking as in any of its other three departments. The Circuit Court of Appeals for the Second Circuit, in the case of *Anderson* v. *Farmers' Loan & Trust Co.*, *supra*, at page 324, said:

> The trust company held investments to an amount exceeding the capital, surplus, and undivided profits. While these investments changed from time to time, they were held for long periods, and assets of the amount indicated may fairly be said to have been regularly invested. In 1906 the trust company for the first time opened a so-called "capital investment account," to which bonds and mortgages were debited to an amount exceeding the capital, surplus, and undivided profits. These mortgages appear to have been carried from the securities account and entered in this capital account in pencil.
>
> We do not think that the possession of securities of a value exceeding the capital, surplus, and undivided profits is proof that no part of the capital, surplus, and undivided

> profits is used or employed in banking. Deposits are not the property of the depositors, but of the trust company.

And again at page 326:

> The capital, surplus, and undivided profits which counsel for the defendant in error insists were not employed in banking, but were permanent investments, we regard as employed in all the business of the bank of every kind. They were available for any use, equally with all other assets of the company, and were therefore employed both in the banking and other business. And this is because the words "capital, surplus, and undivided profits" relate to no particular kind of property, but are expressions describing the amount of the residue of the assets after the liabilities have been deducted.

And again at pages 327 and 328 the court said:

> It is therefore a question of fact, to be determined at the trial, just how far the so-called permanent investments were employed in banking. We do not feel disposed to determine this as a matter of law, without having before us the respective requirements of the plaintiff's banking and trust business for such a character of securities. The nature of the employment of the company's real estate is also a question of fact. What proportionate amount is actually used for the banking business and for the trust business? If a further proportionate amount is used merely for leasing purposes, is such an employment in a purely additional line of business, or is it only in

the banking and trust business because a mere method of saving rental for those lines of business where the land was too valuable to justify a building to be occupied only for offices of the company itself?

We therefore do not intend to intimate that the trial court is not free to determine from the evidence offered how far the capital, surplus, and undivided profits are employed in banking. But the fact of employment or nonemployment is not to be determined by methods of bookkeeping, but by real transactions.

Anderson v. *Farmers' Loan & Trust Co.*, 241 Fed. 322, 328:

> When a trust company is organized, obtains subscriptions for capital stock, and then opens its doors, begins business, and receives various deposits, its assets comprise all its property of every kind. Some of this property it will invest in mortgages, bonds, and stocks; other portions it will loan; still other portions, constituting its cash on hand, it will hold to be drawn against by its customers; other portions of its funds will be used to pay clerks who are engaged solely in the trust, and not in the banking, end of the business. We do not regard any specific assets as constituting capital of the company. The capital, and in the same way the surplus and undivided profits, are the residue left after paying the obligations of the bank to its depositors, and any other indebtedness it may have. These claims may be satisfied out of any property, and

> the balance remaining, which is the capital, surplus, and undivided profits, is to be imputed equally to all kinds of property which the trust company may possess. The proper way, therefore, to determine what part of the capital, surplus, and undivided profits is employed in banking, is to find out what part of the total assets is so employed; when that is done, the same proportion of the capital, surplus, and undivided profits must be thus employed. Any other construction of the act seems to us unreasonable, and to involve the almost inevitable result that trust companies, which are close competitors of the national banks (at times outstripping them in banking business), will be found to be entirely free from a tax which the national banks will have to pay. If investments in securities are held for a long time, and exceed in value the capital, and a designation of these investments as investments of capital can be regarded as indicating that the trust company employs none of its capital in banking, almost every trust company will escape the tax.

In the case of *Germantown Trust Company* v. *Lederer*, 263 Fed. 672, the court held that the evidence was not sufficient to sustain a finding that the plaintiff's capital, surplus, and undivided profits were not used or employed in banking, and went on to say at pages 675 and 676:

> What constitutes capital, and how and in what amount it is employed in different departments of a trust company, including

that of banking, is a question of fact to be determined by the use to which its assets of different kinds are put, and established by evidence of real transactions. *Real Estate Title Insurance & Trust Co.* v. *Lederer, collector*, 263 Fed. 667—C. C. A.—not by evidence merely that its permanent investments equal or exceed its capital (*Anderson* v. *Farmers' Loan & Trust Co., supra*) or by inference arising from a claimed exclusive use of "depositors' money" in banking. *Anderson* v. *Farmers' Loan & Trust Co., supra*. Therefore *deposits and capital are equally company assets*, equally available for the company's use, including that of investments, and equally liable for its debts.

In the case above referred to the Court of Appeals said, at page 675:

> In the case of *Anderson* v. *Farmers' Loan & Trust Co.*, and also in the case recently decided by this court, it was made clear that of a trust company's assets some part may be liable to the tax and some part may not, and to distinguish the parts there must be some segregation, separation, or distinction between that of the bank's assets which is capital, surplus, and undivided profits, and that which is not, in order to show a distinction in their use and in their liability to be taxed. That distinction, to be valid, can not be fanciful, mental, or merely one of bookkeeping, or based upon artificial transactions; it must be actual and be determined by real transactions. (Citing *Canal & Banking Co.* v. *New Orleans*, 99 U. S. 97.)

Appellant, on page 7 of its brief, while trying to get away from the finding of fact that the bank occupied an undefined portion of its office building, says: "These expenses * * * include any expenses incident to the use of a part of the office building." But the fact remains, as found by the lower court, that there was no showing as to how much of the office building the bank occupied, and no evidence that the *bank incurred any expense* by such occupancy.

On page 8 it quotes Finding III of the lower court, to wit, "the plaintiff company's banking business was conducted as a part of its other business," and endeavors to overcome it by repeating that its capital and surplus were invested and the securities placed in its vaults, and listed in its capital stock department. This does not even tend to prove that the finding of the lower court was wrong. This appellant was authorized to carry on four branches of business. Keeping a capital stock department *is not one of those branches.*

This is simply keeping track of a part of its assets which stand behind, and furnish the *basis* upon which it conducts all its branches. Its securities are for the protection of every person who deals with it through *any one of its branches.*

If dishonest bank officials had stolen all of its deposits, its securities could not have been locked up so safely but that it would have been compelled to bring them forth to liquidate its debts due its depositors. Having them listed in its capital stock

account would have proven a valueless subterfuge. And this is how its capital and surplus are used and employed in its banking business. It is not necessary for it to keep its securities upon a counter in its bank for them to be employed in its banking business. Its capital does not need to be placed in the cages of the bank office or passed out over the cashier's counter to be *employed* in the banking business. It is enough that "they were available for any use, equally with all other assets of the company, and were therefore employed both in the banking and other business." *Anderson* v. *Farmers Loan & Trust Co.*, 241 Fed. 324.

The case of *Bailey* v. *Clark*, 21 Wallace, 284, is relied upon by appellant as sustaining its contention. It seems quite clear, however, that it sustains the Government. On page 288, it says:

> It is undoubtedly true, as stated by the Attorney General, that capital used in the business of banking is none the less so because it is borrowed. The mere fact that the money *permanently invested* in the business is borrowed does not alter its character as capital. The question here is whether money not thus *permanently invested*, but *borrowed temporarily* in the ordinary course of business to meet an emergency, is capital; and we are clear that the term does not, either in common acceptation or within the meaning of the statute, embrace loans of that character.

> After controversies had arisen as to the interpretation to be given to the statute, upon the question at issue in this case, between bankers and the Government, Congress passed

> the act of 1872, defining the meaning of the terms "capital employed," in the one hundred and tenth section, and enacted that they "shall not include money borrowed or received from day to day in the usual course of business from any person not a partner of, or interested in, the said bank, association, or firm."

The court expressly says, "that capital used in the business of banking is none the less so because it is borrowed. The mere fact that the *money permanently invested* in the business is borrowed does not alter its character as capital." Appellant invested the deposits as "*permanently*" as it did its capital-stock fund. "The money received from deposits was invested in stocks and bonds which were kept in separate envelopes in separate compartments of the company's vaults and earmarked," etc. In other words, they were kept in exactly the same manner, and the investments were of the same kind, as the investments of the capital-stock department. *And appellant* insists that the capital-stock investments were "*permanent*" and the lower court found they were "*permanent*" investments, whatever that may mean. These deposits were not "borrowed temporarily in the ordinary course of business to meet an emergency."

This appellant, with its millions of resources, does not have any such emergencies.

This act was amended in 1872 defining the meaning of "capital employed" and enacted that those words "shall not include" deposits made from day to day.

With knowledge of these former statutes, Congress enacted the 1898 statute and *omitted all such language;* hence, Congress thus deliberately included all deposites not included in the proviso.

The interest collected on deposits *permanently invested* in 1898 amounted to $92,899.52.

If this meant 6 per cent on loans, it was interest on an invested capital of $1,548,325.

In 1899 the interest was $136,580.34. At 6 per cent on *permanent investments,* as testified, the invested capital was $2,276,339.

In 1900 the interest was $162,466.47. At 6 per cent on *permanent investments* the capital was $2,707,773.

In 1901 the interest was $179,641.34. At 6 per cent on *permanent investments* the capital was $2,994,022.

These figures only refer to *permanent investments* from deposits.

The total amount of deposits run from 2½ to 4¼ millions.

We believe that these figures prove conclusively that, in any event, the *permanently invested capital* from the deposits amounted to a large amount above the assessment.

In *Richmond* v. *Blake,* 132 U. S. 597, this court said:

> He brings himself within the rule that Congress prescribed for determining who, *for the purposes of the taxation in question*—though not necessarily in the commercial sense—were bankers and what was banking business. That rule is expressed in words that leave no

> doubt as to what was the intention of Congress. The judgment below gives effect to that intention, and it is *affirmed*.

Just so, in the case at bar, appellant used its deposits as capital in its banking business in a larger amount than that upon which it was assessed. And to carry out the spirit of this war-time measure, this tax was just and right and should be sustained.

If capital is invested in business, it is certainly employed in the business.

To the same effect is the case of *Webb* v. *Armistead et al.*, 26 Fed. 70. On page 71 the court says:

> It thus appears that Armistead had no capital at any time. It is certain that he put none into his business; if we mean by capital that fund which is put up and subjected to the risks of business as a *basis of credit, and as a security to mercantile creditors* against loss from the misfortunes of trade.

In the case of *State Savings Bank* v. *City Council*, 98 Iowa, 737, the court says, at page 739:

> In order to ascertain the legislative intent, it is necessary to determine what is meant by the words "paid up capital," as used in the part of the act we have quoted. The word "capital," as applied to the money of a corporation, may refer to the money paid in by the stockholders for the use of the corporation, and commonly known as the capital stock; but, in a wider and more popular sense, it includes all the money and other property of the corporation *used in transacting its business.*

In the case of *State ex rel. Bank* v. *Board of Assessors et al.*, 48 La. Ann. Repts. 35, the court uses the following language, at page 37:

> In its broadest meaning capital signifies actual estate, whether in money or property, owned by an individual or corporation. 23 N. Y. 192.
>
> It is the fund upon which a corporation transacts business *which is liable to its creditors*, and in case of insolvency, passes to a receiver. 28 Barbour, 320.

In the case of *International Life Assurance Society of London* v. *The Commissioner of Taxes*, 28 Barbour (N. Y.) 318, appears the following:

> The plaintiffs in the above-entitled suits are foreign corporations, or associations organized under acts of Parliament of Great Britain, for the purposes of insurance * * *. The plaintiffs in each of these actions have complied with the provisions of this act by depositing with the comptroller each the sum of $100,000, in the securities required by the act, and have each established an agency for the transaction of business in the city of New York. Of the sum so deposited by the plaintiffs in the second above-entitled action, $50,000 was invested in stocks of the United States.
>
> This act declares that all persons or associations doing business in this State, and not residents thereof, shall be assessed and taxed on all sums *invested in any manner in said business* the same as if they were residents of this State. (*Laws of* 1855, *chap. 37.*)

> It is insisted on the part of the plaintiffs that this act has no application to them.
>
> They have each $100,000 *invested in the business* carried on by them in this State, and which is declared to be a fund for the security of their creditors within the United States. The provision of our statute in reference to corporations is that they are liable to taxation upon their capital. (1 *R. S.* 414, p. 1.) And the capital subject to taxation as such is defined by the Court of Appeals to be that fund upon which the corporation transacts its business, *which would be liable to its creditors*, and, in case of insolvency, pass to a receiver. (*Mutual Ins. Co.* v. *Supervisors of Erie County*, 4 *Comst.* 448.) We have seen that these deposits made by these plaintiffs are to be held as a fund to meet their liabilities to their creditors.

This case holds squarely that the capital deposited in a vault is *invested in the business.*

Webster says that *invest* means "to lay out money or capital in business with the view of obtaining an income or profit."

Under section 207 of the act of October 3, 1917, C. 63, 40 Stat. L. 306 (Comp. Stat., sec. 6336 3/8*h*) the term "invested capital" is defined as follows:

> (*h*) In the case of a foreign corporation or partnership or of a nonresident alien individual the term "invested capital" means *that proportion* of the entire invested capital, as defined and limited in this title, which the *net income* from sources within the United States *bears to the entire net income.*

This revenue act lays down the practical basic principle which should be applied to all corporations which carry on several branches of business.

If the capital is prorated among the different branches of its business in accordance with the profits of that branch as compared with all the branches, taking the net assets as the basis of the capital, the claimants would be dealt with justly, and the spirit of the law would be carried out.

Of course this can not be done in this case, because the appellants have not furnished the evidence for making this computation.

The case of *Pearce, Wheeless & Co.* v. *The City Council of Augusta*, 37 Ga., 597, is a tax case, and the court on page 599 quotes Bouvier with approval, as follows:

> "Capital in commerce, as applied to individuals, is those objects, whether consisting of money, or other property, which a merchant, trader, or other person, *adventures in an undertaking.*" 1st Bouvier's, 233.

The capital of this appellant was adventured in the banking business because it was liable for all liabilities of the bank. This being true, it was certainly employed in that business.

> *Terre Haute, etc., R. Co.* v. *State, ex rel.*, 159 Ind. 438.

In the above case the court was called upon to construe the words "the full sum invested" and "capital employed," as used in the company's charter. The court said, on page 458:

> In popular sense, "the full sum invested" and "capital employed," which are clearly used here as synonymous terms, usually means an *original sum placed upon a venture* with a view to profits or an income.

The capital of appellant was certainly "placed upon a venture," to-wit, banking; for it was a guarantee against all losses.

On page 11 of the appellant's brief it sets forth part of the statute of 1864 and on page 12 a part of the amendment of that statute passed in 1866. Appellant then proceeds to state that "while the act of 1864 made the amount of the tax dependent upon the capital used or employed in the banking business, whether the banker was corporate or individual, the act of 1866 distinguished between corporate and individual bankers and imposed the tax in the case of corporate banks upon their usual capital, *however employed;* but, in case of individual bankers, only upon the capital actually employed."

I can not agree with this deduction; the amendment of 1866 refers to "banks chartered," etc., * * * and "bankers using or employing a capital," etc.

"Banks chartered" could only do a *banking business*—that is, the business for which it was chartered—and consequently those chartered banks must use their entire capital. It was not necessary to talk about "chartered banks," "using or employing" their capital in the banking business, for that is the only purpose for which they could use or employ their capital. *Central Trust Co. of N. Y.* v. *Treat,*

171 Fed. 302, which cites with approval, *Leather M'f'r's. National Bank* v. *Treat*, 116 Fed. 774. Of course, private bankers would only be taxed upon the money they would have in the business. They might own farms or stores besides the banking business; but a bank chartered for no other purpose than for the running of a bank must use its funds for that purpose only. Appellant then comments upon the opinion of Judge Woodruff in this same *Clark* v. *Bailey* case, which appears in 12 Blatchford, 156. Here again I must differ from appellant. Judge Woodruff said (pp. 158–159):

> Under the act of June 30, 1864, there was some uncertainty in the application of the terms used, when applied to a mere individual or firm. By the 110th section of that act (13 U. S. Stat. at Large, 277) the tax was directed to be levied, each month, "upon the average amount of the capital of any bank, association, company, or corporation, or person, engaged in the business of banking, beyond the amount invested in United States bonds." *When a person was found* engaged in the business of banking, *it was not clear that, as he answered the description* in the statute, the tax was not to be levied *on all of his capital, however invested or employed.* The same individual or firm might be engaged in the business of banking, and, at the same time, have capital employed in manufacturing or otherwise. * * * The act of 1866 removed this doubt. * * * Under the act of 1864, what was the "capital"

> of such a person? It was not easy to say, unless, by construction, it was held to mean what the act of 1866 makes it mean, the capital employed in the business of banking. * * * So, also, in a supposable case, the capital of a firm may consist, in part, or even in whole, of money or property borrowed to be employed as capital, as the basis of the financial reputation and credit of a firm, and, as between the lender and the creditors of the firm, to be at the risk of the business. No doubt a member of a copartnership often borrows a portion, and sometimes the whole, of his contribution to the capital stock from personal friends. It may be lent for the very purpose of such contribution, and so become in every sense a part of the capital or stock in trade. No doubt all of the members of a copartnership, and even the firm in its joint capacity, may procure such special advances to be placed as between the lenders and the copartnership creditors, at the risk of the business, as the *basis of copartnership credit and to constitute the fund to which creditors may look as their security* before the lender is permitted to withdraw it. This suggestion is also made in order to exclude the contrary inference and not because any such state of facts exists in these cases.

In this case the question was whether or not money loaned or borrowed for *temporary use* should be considered as a part of the capital and the court held that such a loan should not be so considered.

Appellant quotes the court in this case as defining capital as follows:

> When used with respect to the property of a corporation or association the term (capital) has a settled meaning. It applies only to the property or means contributed by the stockholders as the *fund or basis* for the business enterprise for which the corporation or association was formed (p. 284).

This corporation was formed for four purposes, one of which is the banking business. The "means contributed by the stockholders as the *fund* or *basis* for the business enterprise for which the corporation was formed" was its capital stock, and that definition places appellant squarely within the class described.

When the acts of 1864 and 1866 were passed, Congress (in my opinion) never thought of a great trust company with powers to do banking and several other kinds of business.

Appellant was incorporated in 1890 under a statute passed in 1874. There is no evidence in this case of the existence of any earlier statute. It is a matter of common knowledge that trust companies like the appellant are comparatively modern institutions, with rather a small beginning some 40 years ago; consequently, when the statutes of 1864 and 1866 referred to banks, they meant banks pure and simple, and not great trust companies which run a bank as part of its business.

In *Anderson* v. *Farmer's Loan & Trust Co.*, 241 Fed. 326, Circuit Court of Appeals, second circuit, Judge Hand says:

> By the amendment of 1914 trust companies were allowed in addition to their former banking powers, to discount commercial paper and to accept drafts drawn upon them. The real distinction, however, which may be made between the case of *Treat* v. *Farmer's Loan & Trust Company*, 185 Fed. 760, 108 C. C. A. 98, and the case at bar is that in the Treat case *the trial judge found as a fact that the capital and surplus were not employed in banking*, but were permanently invested. In *Leather Manufacturers' Bank* v. *Treat*, *supra*, this court had reached an opposite conclusion in a case where the sole business was banking.
>
> The Farmers' Loan & Trust Company does a large trust business, the extent of which is not shown by the record. It also does a large banking business, the extent of which is at least partially shown. It would be possible to determine by further evidence the relative proportionate amounts of assets employed in banking and in trust business. If such a proportion were determined, and it appeared that one-half of the assets were employed in banking and the remaining one-half in trust business, it would seem to follow that one-half of the capital and surplus was employed in banking. The computation might be difficult, but it seems to us entirely practicable.
>
> Upon the most familiar principles one can not by suit recover any taxes once paid, which

> in fact were due even though the exact manner of their collection was not authorized.

The court will notice that this case distinguishes the *Treat* v. *Farmers' Loan & Trust Co.* case, 185 Fed. 760, by saying that "The real distinction is that in the Treat case the trial judge found as a fact that the capital and surplus were not employed in banking."

In the instant case the lower court found that they were employed in banking.

In other words, it is the duty of the appellant to prove that it was not employing a capital equal to the amount assessed.

Its capital stock, its surplus, and its deposits run from over four and one-half millions in 1898, when it was assessed on $25,000, to nearly nine millions in 1901, when it was assessed on $1,500,000.

To this must be added its undivided profits. In these four years there was carried to the undivided profits account over $275,000. How many more millions were in this account does not appear. *After all profits had been transferred to this one account—*

> a part of the income from each department was maintained as cash and remained uninvested, part of the money being carried by the respective departments as counter cash and the balance being deposited in the company's various depositories. The money so deposited was not segregated according to the source from which it came, though the source of the items comprising its total amount was recorded in the respective books of each department. (See Finding VII, R. 22.)

What was done with these vast sums in these depositories does not appear. Ordinarily they are subject to drafts issued by the bank.

In my opinion, from anything that appears in this record, one and one-half millions of dollars in this account may have been used by the bank.

And it makes no difference as to the manner in which the tax was assessed. If the tax was due the United States in any manner, or from any fund, the appellant can not recover.

Appellant, by its argument on page 16 of its brief, seems to think that if it can show that its money received from the sale of its stock, together with its surplus, were not physically used in its bank, it can escape the tax. The Government believes that as the statute says "capital used or employed including surplus" the law includes any fund so used, without regard to where the bank gets it; and that whatever fund is so used, that fund is the capital employed.

And in this instance it may have been deposits, or undivided profits, or undivided profits which were actually used, or an equitable portion of its entire net assets, found by comparing its banking business with the business of its other branches.

As the appellant has not furnished the court with the facts by which it can arrive at this conclusion and proper adjustment, it has failed to make out its case, and it must pay this tax.

In *Real Estate Title Insurance & Trust Co.* v. *Lederer*, 229 Fed. 803, banking was a part of its business.

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The court says:

> It lays claim to the benefit of the principle of exemption from taxation which it asserts to have been applied in the cases of *Central Trust Co.* v. *Treat* (C. C.), 171 Fed. 301, and *Treat* v. *Farmers,* 185 Fed. 760, 108 C. C. A. 98.
>
> If the principle there applied is as broad as it is claimed to be, and can be upheld as law and is applicable, it undoubtedly rules the present case in favor of the plaintiff. It is confidently asserted that the rule established by these cases is that, if the moneys received from depositors are kept separate from the other moneys of the bank and are invested in securities which are likewise kept separate from the other investments of the bank, and no more in amount of the moneys of the bank are invested in commercial paper by discount or purchase than is represented by the investments made of deposit moneys, the other moneys of the bank being invested in so-called permanent (whatever this may mean) forms of investment, then the legal inference is that no part of the capital of the bank is invested in banking except the sums which may have been spent for a banking house or banking fixtures and the like.
>
> We do not understand any such principle to be deducible from the rulings in the cited case. There are, it is true, some expressions in the opinions accompanying the rulings which supply plausible support to the argument of counsel for plaintiff. As has been often remarked, however, opinions are to be read in the light of the facts of the case to which they

relate. The cited case was decided as a case stated, the facts being stipulated. It, moreover, arose under a different act of Congress. *The agreed fact* was that the *capital* of the bank in that case was *invested in securities which had no relation to banking*, and that all the funds of the bank which were in any way used or employed in banking were moneys belonging to depositors, *and that no part of the capital or surplus of the bank was so used or employed*. It was no part of the duty of the court—indeed, it was powerless—to change the effect of the stipulation. The agreed fact being that the banking business was carried on without any capital being employed, the court could not do otherwise than rule that no tax was payable. This is a very different thing from ruling as a matter of law that, if some of the moneys of a bank were invested in commercial paper, and some in other forms of investment, and if the aggregate investments in commercial paper do not exceed the aggregate sum owing to depositors, no part of its capital is used or employed in banking.

There are at least two seemingly unsurmountable obstacles in the way of reaching such a conclusion. One is how the character of the investments in which the banker puts his money can make any difference. * * *

It must be, however, that granted one is a banker and has money in the banking business, the character of the investments he makes of these moneys can have no bearing upon the question of the amount of capital he has invested in that business.

> The other obstacle is the utter impossibility of its being held as a matter of law that the capital, surplus, or undivided profits of a bank, either separately or in a lump, can be segregated from its other assets and identified as such. The loose phrases in common use which might seem to imply such a possibility it is well understood do not. A bank or trust company might be said to have invested its surplus in the erection of a banking house or an office building. Everyone understands that all that is meant by this is that it has so invested a sum equal to a certain part of its estimated accumulated profits. Surplus, and kindred words, are nothing more than banking expressions. It is certainly clear that in no legal sense can either capital or surplus be earmarked as a concrete thing. The answer to the retort of counsel that "this company plaintiff not only can do it, but has done it," is an obvious one.

I want to call especial attention to the fact, that this court says, that in the *Treat case* "It was agreed that no part of the capital or surplus of the bank was so used or employed. It was no part of the duty of the court, indeed it was powerless to change the effect of the stipulation." In the case at bar, the Court of Claims found just the opposite. The court further said "*the agreed fact being that the banking business was carried on without any capital being employed*, the court could not do otherwise than rule that no tax was payable."

This case was reversed by the Court of Appeals because the lower court excluded certain evidence, which no doubt should have been admitted. But to my mind the reasoning is correct.

In the case of *Central Trust Co., of New York*, v. *Treat*, 171 Fed. 301, the court says that the "plaintiff *is not a bank or banker*, but does some of the things enumerated in the section as indicative of such business"; and that the only question is, "whether the tax is payable on $11,078,355.29, being accumulated and undivided profits resulting from the conducting of the business of complainant for many years."

In the case at bar, appellant is a banker, handling millions in the banking business.

In the Treat case the evidence does not show that any part of these millions *had been accumulated* in the banking business.

In the case at bar, all net profits from the banking business were carried to the undivided profits of the company, and the greater part of the deposits were put in *permanent investments*, and locked in its vault.

What the word surplus means in the act of 1898.

In the case of *Leather Manufacturers' National Bank* v. *Treat*, 116 Fed., 774, 775, 776, the court said:

> (P. 775.) The only question presented is whether the word "surplus," as used in the phrase "in estimating capital surplus shall be included," is to be construed as having some restricted meaning, or in its natural and ordinary sense, as including the entire overplus of assets over liabilities.

> (P. 776.) And it would seem absurd to hold, though it seems to be a natural corollary from the propositions advanced by plaintiff, that a board of directors could set aside large sums each year from the profits, accumulating an additional fund equal perhaps to the capital, and used in the same way and escape the tax upon it by the simple device of calling it "undivided profits." It would seem, rather, that Congress *used the word "surplus" in its ordinary sense, as indicating the amount left over after setting aside sufficient of the assets of a banker to meet his liabilities.*

The case of *Real Estate Title Ins. & Trust Co.* v. *Lederer* (C. C. A. 3d Cr.), 263 Fed. 667, is relied upon by appellant to sustain its theory in the case at bar, but that case is to be distinguished for the reason that the question before the court there was the failure of the trial court to admit evidence tending to show in what proportion plaintiff's capital, surplus, and undivided profits were used or employed in the various departments of its title, trust, safe-deposit, real estate, and banking business, and the court held that to be a question of proof. Which was correct. In the case at bar appellant has had the benefit of the holding of that case and has failed, under the proof, to make out a case which warrants a recovery.

In the case of *Selden* v. *Equitable Trust Co.*, 94 U. S. 419, the court held that the trust company was not a banker because it did none of the things enumerated in section 3407 of the Revised Statutes as constituting banking; that the bonds sold by the trust company

were its own property and it did not "receive them for sale" as an agent for a principal.

In the case of *Treat* v. *Farmers' Loan & Trust Co.*, 185 Fed. 760, 765, the Circuit Court of Appeals for the Second Circuit affirmed the decision of the trial court on a finding that the capital and surplus were not used or employed in banking. Appellee does not agree with the conclusion reached in that case, but the question there involved and decided is not involved in this case, for the reason that in the case at bar the lower court found that the capital and surplus of this appellant were used and employed in banking. There is nothing in the Treat case to show that the *deposits were permanently invested.*

Anderson v. *Farmers' Loan & Trust Co.*, 241 Fed. 322, 327:

> The case at bar seems somewhat different. In the first place, it is doubtful if any such occasion for the existence of the investments appeared in the Spreckels case as in the case of a banking institution where large reserves are so important to the conduct and success of business. These investments, as the undivided profits in the case of *Leather Manufacturers' Bank* v. *Treat*, *supra*, are all to be regarded as employed in the business of the company.
>
> In the case at bar the tax is levied on capital employed in banking and not upon income derived from the banking business. Assets may be employed in the business of banking, when dividends derived from them are not receipts from the banking business at all. In

other words, the terms of the statute regulating the tax in the Spreckels case were different from those in the act determining the tax for the case at bar. The Spreckels case, therefore, never decided that the *deposits and securities of that company were not employed in the business of refining sugar*, but only held that income derived from those assets could not properly be regarded as coming within the definition of *receipts from the business of refining sugar.*

B.

BURDEN OF PROOF TO SHOW THE TAX WAS NOT DUE.

The appellant had the burden of establishing by a preponderance of the evidence that the tax collected, or some part of it, was not due, and it is most respectfully insisted that the appellant has not established this fact.

It must be assumed, in the absence of proof by the plaintiff to the contrary, that the taxes were legally and properly assessed and were due and payable. The presumption at the outset is that plaintiff's capital and surplus upon which the tax was computed were used or employed in the banking business. To recover plaintiff must adduce evidence competent to refute the prima facie case established in favor of the defendant by the assessments.

Mr. Justice Hunt, in *Arthur* v. *Unkart*, 96 U. S. 118, at page 122, referring to the presumption of correctness which follows a decision of a collector of customs that articles are dutiable at a certain rate, said:

> These officers are, however, selected by law for the express purpose of deciding these questions; they are appointed and required to pronounce a judgment in each case; and the conduct, management, and operation of the revenue system seem to require that their decisions should carry with them the presumption of correctness. This rule is not only wise and prudent, but is in accordance with the general principle of law that an officer acting in the discharge of his duty, upon the subject over which jurisdiction is given to him, is presumed to have acted rightly.

In the case of *Canal & Banking Co.* v. *New Orleans*, 99 U. S. 97, the court said:

> In this suit the burden of proof is on the bank to show that it has been unlawfully taxed. The decision of the assessor must stand unless it can be affirmatively controverted.

In *Bailey* v. *Railroad Company*, 22 Wall. 604, which was a suit brought by the corporation to recover taxes paid a collector of internal revenue under the internal revenue act of June 30, 1864, Mr. Justice Clifford said, at page 638:

> Mere irregularities may be passed over without remark, as the suit is an action of assumpsit brought by the plaintiffs to recover back money which they paid to the collector, and the burden is upon them to show that the defendant *ex equo et bono* is bound to refund the amount which they paid.

In *Shafer* v. *Craft*, 144 Fed. 907, which was a suit in the district court to recover a special tax assessed and collected from the plaintiff as a dealer in oleomargarine, Judge Evans said, at page 909:

> As some question was raised at the hearing as to the burden of proof, it may be added that in the opinion of the court it rested upon the plaintiff not only because it was, in the nature of things, quite as easy for him to prove that he did not sell colored oleomargarine as it was for the Government to prove that he did, but also because (1) plaintiff asserts the negative proposition as the basis of his claim; and (2) the presumption would arise from the facts stated in the pleadings that the officers of the United States, both here and in Washington, did their duty in ascertaining and determining the fact before making the assessment of the $48.

In *Western Express Co.* v. *United States*, 141 Fed. 28, which was a suit brought by the United States to collect special taxes that had been assessed against defendant, Philips, J., said, at page 30:

> The controlling question, therefore, for decision is whether or not there was any evidence in the case to support the finding. If there was, the verdict must stand. The action being based upon assessments made by the proper revenue officers of the Government, the law presumes that these officers proceeded regularly; that on due inquiry they ascertained the existence of the essential facts subjecting the defendant to such tax. In this respect such officers act in a quasi judicial capacity, and their action stands as prima facie correct

until this presumption, by countervailing proof, is met and overthrown by the party assessed.

In *Schmitt* v. *Trowbridge*, Fed. Cas. No. 12468, Judge Brown, in his charge to the jury, said:

> In determining these tax cases the Government is entitled to certain presumptions. It is a matter of necessity that it should be so. For instance, I charge you that, where the Commissioner of Internal Revenue makes an assessment of this kind, the presumption is that the assessment is correctly made.

In the comparatively recent case of *Anderson* v. *Farmers' Loan & Trust Co.*, 241 Fed. 322, at page 329, the court said:

> In order to recover any part of the taxes the Farmers' Loan and Trust Company should have shown just what portion of the tax was levied upon capital, surplus, and undivided profits which were not used or employed in banking. It was not sufficient to show that the commissioner proceeded without proper evidence, or otherwise erroneously, and then rest; but the company had the burden of establishing by a preponderance of the evidence that the tax collected, or some part of it, was not due.

III.

THE ACTION IS BARRED BY LIMITATIONS.

In the instant case the plaintiff, acting under the provisions of act of July 27, 1912, c. 256, 37 Stat. 240, presented to the Commissioner of Internal

Revenue on November 22, 1913, its claim for the refund of taxes alleged to have been erroneously or illegally collected under the war revenue act of 1898. This claim was rejected in April, 1917, and suit was filed on July 25, 1918. It is submitted that this cause of action was barred by the operation of the statute of limitations.

Had this action been brought prior to the enactment of a refunding act it is clear that the action would have been barred by section 3227 of the Revised Statutes, two years after the cause of action had accrued. The applicability of section 3227, R. S., is clear and undoubted. (*Christie-Street Commission Co.* v. *U. S.*, 136 Fed. 326).

The question now arises whether the enactment of the act of 1912 has created a situation which is not amenable to the bar set up in section 3227, R. S. The plaintiff urges that its cause of action would not be barred by the operation of any statute of limitations until January 1, 1920, and in support of this contention cites the following cases:

U. S. v. *Hvoslef*, 237 U. S. 1.
Sage v. *U. S.*, 250 U. S. 33.
Kahn v. *U. S.*, No. 52, October term, 1921.

An examination of the Hvoslef and Sage cases indicates that the act of 1912 created new rights. The exact nature and juridical import of these new rights are not clearly set forth, however. Further inquiry thus becomes necessary to determine the nature of the right upon which the cause of action is based

and the relation between the act of 1912 and section 3227, R. S.

The act of 1912 was a statute passed for the benefit of persons who had paid certain taxes which were not properly collectible, and one of the new rights which that act created was the right of such taxpayers who had complied with the terms of the statute to recover from the United States such sums of money as had been erroneously or illegally collected from them in the form of taxes, even though such taxes had not been paid under protest. Hitherto protest at the time of payment of the alleged illegal tax was essential to recovery. (*Hvoslef* v. *U. S.*, 237 U. S. 1.)

Another new right created by the act of 1912 was the right to obtain a refund from the United States without filing anew the claim with the Commissioner of Internal Revenue in case the claim had already been presented to the commissioner prior to the enactment of the act of 1912. (*Sage* v. *U. S.*, 250 U. S. 33.)

The act was passed, as shown by its title, to extend the time for the repayment of certain war-revenue taxes erroneously collected, and thus was the bar temporarily suspended. The interest of the claimant remained the same, but it was given vital force and effect by the new and additional remedy provided for by the act of 1912.

The aforesaid facts and the further fact that when money is repaid to a claimant it is on the assumption, not of bounty, but that money erroneously collected as taxes is being repaid (*Coleman* v. *U. S.*,

250 U. S. 30), these facts show clearly that when suit is brought upon such a claim, it is a suit for the recovery of a tax erroneously or illegally collected, and within the terms and meaning of section 3227, R. S.

Presumably it is on the theory that since the act of 1912 created new rights, section 3227, R. S., is contended by plaintiff to be inapplicable. Yet in none of the decisions has it been affirmatively stated that such a rule of law obtains, unless it be the case of *Sage* v. *U. S.*

When the Court of Claims passed upon the case at bar it based its decision upon the *Union Trust Co.* v. *United States*, 55 C. Cls. 424. In that case the court said, at page 429:

> We do not lend assent to the proposition that the tax in question was not placed upon the capital used or employed in the business of banking when there were other kinds of business dealt in by the same person or corporation. The statute does not require or direct that all the capital be used or employed in a particular line of business. It defines a banker and lays a tax on the banker using or employing a capital, graduating it according to the amount of capital and surplus. It taxes alike "every incorporated or other bank" and "every person, firm, or company" having a place of business where certain credits are opened. It does not undertake to say that every dollar of the capital and surplus of the banker, as defined in the act, shall be employed or used in the banking business. It

accords to him the right, if he chooses, of locking up his entire capital in his strong box or in using or employing it in strictly banking business, or in otherwise using or employing it. But if he does the business of a banker he is taxed on the amount of the capital which he uses or employs in his business, of which that of banking may be but a part. It is the one person or firm or company or bank which is taxed, and the capital used or employed can be ascertained. It was not contemplated by the act that a firm, company, or bank engaging in several lines, and being a banker, could escape the tax under a claim that only a part of its capital and surplus was used or employed by it, acting as a banker. The act fixes the tax upon the banker "using or employing" a capital. The two words are not to be accorded the same meaning. Using a certain capital implies it is being made use of, while employing a certain capital does not mean an actual use of it, but rather the having it available for use when and as needed or desirable.

The question of the statute of limitations has been called to our attention by the defendant. We think that the action predicated upon this claim is barred. We base this opinion upon the decision rendered in this court on April 5, 1920, in the case of *Kahn et al.* v. *United States*, *ante*, p. 271.

The petition must be dismissed, and it is so ordered.

Upon the question of *limitations*, when the Court of Claims decided the Union Trust Company case, it

referred to and based its opinion upon the case of *Otto H. Kahn et al., Ex'rs,* v. *United States* (55 C. Cls. 271). In the Kahn case the court said, at pages 284, 285, and 286:

> The next preceding claim (Finding XIII), and the only one left for consideration, was filed April 4, 1904, by Otto H. Kahn, one of the executors. We are mindful of what has been said by the Supreme Court in the Sage case, 250 U. S. 33, but since some doubt exists in our minds as to the application of the rule laid down in that case, under the facts as they appear in the instant case with reference to the consideration of this claim as a proper basis for this action, we venture to suggest the provisions of the statute which seem to us clearly to bar any action predicated upon this claim. We quote sections 3226 and 3227 of the Revised Statutes:
>
> "Sec. 3226. No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until appeal shall have been duly made to the Commissioner of (the) Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of the commissioner has been had therein: *Provided,* That if such decision is delayed more than six months from the date of such appeal, then the said suit may be

brought without first having a decision of the commissioner at any time within the period limited in the next section."

"Sec. 3227. No suit or proceeding for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, shall be maintained in any court unless the same is brought within two years next after the cause of action accrued: *Provided*, That actions for such claims which accrued prior to June six, eighteen hundred and seventy-two, may be brought within one year from said date; and that where any such claim was pending before the Commissioner, as provided in the preceding section, an action thereon may be brought within one year after such decision and not after. But no right of action which was already barred by any statute on the said date shall be revived by this section."

Section 3227 prohibits the maintenance of any suit *in any court* unless the same is brought within two years next after the cause of action has accrued. This claim was filed April 4, 1904. The cause of action accrued under the statute when the Commissioner of Internal Revenue rejected the claim or, if he did not act, when his decision thereon had been delayed for more than six months. The claim in part rejected was not refiled under the act of 1912, and no action was had thereon after its original rejection by the Commissioner

of Internal Revenue. But conceding that the right of action thereon was revived by the act of 1912 and applying the holding in the Sage case, that until January 1, 1914, no statute of limitations could begin to run, which as to this case must be regarded as a liberal holding, it is still apparent that under section 3227 no action could be maintained with this claim as its basis unless it were brought on or before January 1, 1916. This action was commenced July 2, 1917. The general statute of limitations in this court (section 156, Judicial Code) is not permissive in form in the sense that it specifically permits *any action* of which this court has jurisdiction to be brought at any time within six years, notwithstanding any other statute, but it forever bars any claim unless sued upon or transmitted within six years, and hence there is no necessary conflict between it and the provisions of section 3227, applicable to a particular class of cases, prohibiting the maintenance of any suit of this character *in any court* unless brought within two years. *Fort Pitt Gas Co.* v. *United States*, 49 C. Cls. 224 at 234, citing *Christie-Street Com. Co.* v. *United States*, in the Circuit Court of Appeals for the Eighth Circuit, 136 Fed., 326, in which it was said: "It is an action directly against the United States, and the logical and unavoidable conclusion is that it was barred by the limitation of section 3227, because it was not commenced until more than two years after the cause of action it presents accrued." And the last-named case is cited with approval in *United States* v. *Emery*, 237 U. S. 28–32,

although it was a jurisdictional question in this class of cases there under discussion, and it is said, as to these cases, that they are "founded upon the revenue law" of which section 3227 is a part. But for the Sage case, we would entertain the opinion that there could be no question that an action predicated upon this claim was barred in two years, and we entertain such doubt as to whether the Supreme Court intended under such circumstances to substitute the six-year statute of limitations in this court for the express provision of section 3227, that we venture to suggest the question.

The Kahn case was appealed to this court, but the court affirmed the decision of the lower court without mentioning the question of limitations.

United States v. *Hvoslef*, 237 U. S. 1.

The above case is cited by appellant as holding that he is not barred by the statute of limitations. On page 8 the court says:

> The Government contends that the court erred in deciding (1) that the court had jurisdiction of the case, (2) that it need not be averred or proved that the tax was paid under protest, and (3) that the tax was invalid.

The decision does not give the dates so as to be able to determine as to whether or not the statute of limitations applies, but from the court record the following appears:

> (*a*) The tax for which suit was filed was paid under the war revenue act of 1898.

(*b*) The Commissioner of Internal Revenue rejected the claim for refund January 22, 1913.

(*c*) Suit was filed February 11, 1913.

(*d*) The district court heard the case August 28, 1913.

Consequently no statute of limitations could be invoked in this case and no such question could be made or that issue be considered by this court.

The court does say that an action on the refunding act of 1912 is "founded upon a law of Congress within the meaning of the provisions of the Tucker Act," so as to give the District Court jurisdiction. To sustain this statement the court cites *Medbury* v. *United States* (173 U. S. 492). In that case the court said (pages 496 and 497):

> Congress has from time to time passed laws on the subject of the revenue, which not only provide for the manner of its collection, but also point out a way in which errors can be corrected. These laws constitute a system which Congress has provided for the benefit of those persons who complain of illegal assessments of taxes and illegal exactions of duties. In the administration of the tariff laws, as we have seen, the Secretary of the Treasury decides what is due on a specific importation of goods, but if the importer is dissatisfied with this decision, he can contest the question in a suit against the collector, if, before he pays the duties, he tells the officers of the law, in writing, why he objects to their payment.

And again the court said:

> Can it be supposed that Congress, after having carefully constructed a revenue system, with ample provisions to redress wrong, intended to give to the taxpayer and importer a further and different remedy? The mischiefs that would result, if the aggrieved party could disregard the provisions in the system designed expressly for his security and benefit, and sue at any time in the Court of Claims, forbid the idea that Congress intended to allow any other modes to redress a supposed wrong in the operation of the revenue laws than such as are particularly given by those laws.
>
> The system spoken of in the opinion provided a general scheme for the collection of the revenue, and also provided adequate means for the correction of errors by a resort to a suit in a court of law prosecuted in the ordinary way. While it gave rights, it provided a special but full and ample remedy for their infringement. It certainly could never be presumed that Congress, while thus furnishing an adequate method for the correction of errors, intended that the party aggrieved might refuse to follow such remedy and resort to some other and different mode of relief. It is quite plain that the remedy thus specially indicated was exclusive, and that the act giving jurisdiction to the Court of Claims had no application.

To sustain that same statement the court also cited *McLean* v. *United States* (226 U. S. 374). This case does not mention the statute of limitations.

Sage v. *United States* (250 U. S. 33).

This case is not against the contention of the Government and the decisions of the Court of Claims, that the case at bar is barred by section 3227 of the statute of limitations.

As the Government is advised that the decision in the case at bar will virtually decide about 200 cases, involving over $1,000,000, we respectfully ask the court to distinguish between the Sage case and the case at bar, and to consider said section 3227.

In the Sage case the court seems to base its finding upon the case of *James* v. *Hicks* (110 U. S. 272). We respectfully submit that that case throws no light upon this question. In that case the refunding statute of 1872 provided that "an action thereon may be brought within one year after such decision and not after." (The decision of the commissioner.) The commissioner decided the appeal on January 22, 1879. Hicks brought his suit on August 15, 1879—within the year—and the court held that he was within the statute.

I can not understand what bearing the Hicks case had upon the question at issue in the Sage case. There is no doubt but what the statute of 1912 did give appellant additional rights, but the Government believes that those rights do not interfere with the statute of limitations as set forth in the law relating to revenue, as decided in the Medbury case.

In the case at bar the appellant has been guilty of great laches. The refunding act was passed July 27, 1912. The claim was filed November 22, 1913, when about one year and four months had elapsed of the

year and five months given in which to file the claim with the commissioner.

The claim was disallowed by the commissioner April 16, 1917. This action was brought July 25, 1918, over four years after suit could have been brought. First, there was a delay of one year and four months, leaving only one month in which to act; and then there was a delay of over four years; because under the statute, this suit could have been brought at the end of six months after the claim was filed with the commissioner.

In the Medbury case this court said that the act giving jurisdiction to the Court of Claims had no application. We insist that the same reasoning should be applied in this case, and that the statute of limitations in the Court of Claims act should be construed in the language of Judge Downey in the Kahn case (p. 286), to wit:

> The general statute of limitations in this court (section 156, Judicial Code) is not permissive in form in the sense that it specifically permits *any action* of which this court has jurisdiction to be brought at any time within six years, notwithstanding any other statute, but it forever bars any claim unless sued upon or transmitted within six years, and hence there is no necessary conflict between it and the provisions of section 3227, applicable to a particular class of cases, prohibiting the maintenance of any suit of this character *in any court*, unless brought within two years. *Fort Pitt Gas Co.* v. *United States*, 49 C. Cls. 224 at 234,

> citing *Christie-Street Com. Co.* v. *United States*, in the Circuit Court of Appeals for the Eighth Circuit, 136 Fed. 326, in which it was said: "It is an action directly against the United States, and the logical and unavoidable conclusion is that it was barred by the limitation of section 3227, because it was not commenced until more than two years after the cause of action it presents accrued."

In the Sage case this court was only asked to consider section 1069, R. S., which is the six-year limitations statute in the Court of Claims act. The Government took the position then that said limitations began to run when the application for a refund was made. This application was made in August, 1903.

> All the cases cited in the Sage case on the limitations question were upon the point that the statute began to run *when the application was filed*. Hence the statute of limitations which we are now asking the court to consider was not presented nor passed upon in the Sage case. Consequently we are asking the court to distinguish the case at bar from the Sage case.

Rice v. *United States*, 122 U. S. 618, the court said:

> While Congress had declared a general limitation of six years for "every claim cognizable by the Court of Claims," and a still shorter one of two years, for claims under the captured or abandoned act, it is unreasonable to infer that it intended to confer upon every claimant under the act of 1877 * * *.

The above clearly holds that the general statute (sec. 1069, R. S., sec. 156, Judicial Code) of six years,

and the special statute (sec. 3227, R. S.) of two years, both apply to Court of Claims cases.

Christie-Street Commission v. *United States*, 136 Fed. Rep. 136:

> (Pages 327–8.) SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.
>
> The case presents two questions: May one whose claim for a repayment of internal taxes illegally collected has been presented to, but has not been allowed by, the Commissioner of Internal Revenue (section 3226, Rev. St., 2 U. S. Comp. St. 1901, p. 2088) maintain an action against the United States to recover these taxes under the act of March 3, 1887 (24 Stat. 505, c. 359, 1 U. S. Comp. St. 1901, pp. 752, 753)? If so, does the limitation of two years fixed by section 3227, Rev. St., U. S. Comp. St. 1901, p. 2089, or the limitation of six years provided by section 1 of the act of 1887, fix the time within which the action may be successfully brought?
>
> Sections 3220, 3226, 3227, Rev. St., U. S. Comp. St. 1901, pp. 2086, 2088, 2089, are a part of the system of laws enacted by Congress for the collection of the taxes imposed to obtain the internal revenue of the government, and to adjust the claims for excessive payments exacted by the officers of the nation. By these sections the Commissioner of Internal Revenue is authorized to—
>
> "Pay back all taxes erroneously or illegally assessed or collected * * * also to repay to any collector or deputy collector the full amount of such sums of money as may be

recovered against him in any court, for any internal taxes collected by him." Section 3220.

They also provide that:

"No suit shall be maintained in any court for the recovery of any internal tax alleged to have been erroneously assessed or collected * * * until appeal shall have been duly made to the Commissioner of Internal Revenue * * * and a decision of the commissioner has been had therein: *Provided*, That if such decision is delayed more than six months from the date of such appeal, then the said suit may be brought, without first having a decision of the commissioner at any time within the period limited in the next section." Section 3226.

Section 3227 declares that:

"No suit or proceeding for the recovery of an internal tax alleged to have been erroneously or illegally assessed or collected * * * shall be maintaned in any court unless the same is brought within two years next after the cause of action accrued."

The act of March 3, 1887, was conceived and passed with no special reference to claims for taxes illegally collected for revenue purposes, but to authorize the adjudication of four general classes of claims against the United States in the Court of Claims and in the Circuit and District Courts. It gave to those courts jurisdiction of—

"All claims (1) founded upon the Constitution of the United States or any law of Congress, except for pensions; * * *"

(Page 328.) It is conceded on all sides that, if this action can be sustained at all, it is because it is of the first class, and that its maintenance is conditioned by the true answer to the inquiry whether or not it is "founded upon any law of Congress."

(Page 330.) The decisions of the Supreme Court upon the specific question before us evidence a constantly increasing tendency to adopt this view.

In the year 1868, in the case of *Nichols* v. *U. S.*, 7 Wall. 122, 131, 19 L. Ed. 125, that court held "that cases arising under the revenue laws were not within the jurisdiction of the Court of Claims."

In the year 1877, in *U. S.* v. *Kaufman*, 96 U. S. 567, 24 L. Ed. 792, it held that its declaration in the Nichols case was too broad, and that the act of 1855 gave the Court of Claims jurisdiction of an action upon a claim for taxes illegally collected, which had been allowed by the Commissioner of Internal Revenue.

In 1881, in *U. S.* v. *Savings Bank*, 104 U. S. 728, 734, 26 L. Ed. 908, it affirmed this decision.

In the year 1900, Dooley, Smith & Co. had brought an action against the United States in the Southern District of New York to recover back certain taxes illegally exacted from them upon merchandise imported into Porto Rico from New York.

(Pages 230–1.) In the cases under consideration the argument is made that the money was tortiously exacted, that the alternative of

payment to the collector was a seizure and sale of the merchandise for the nonpayment of duties, and that it mattered not that at common law an action for money had and received would have lain against the collector to recover them back. But whether the exactions of these duties were tortious or not—whether it was within the power of the importer to waive the tort and bring suit in the Court of Claims for money had and received, as upon an implied contract of the United States to refund the money, in case it was illegally exacted—we think the case is one within the first class of cases specified in the Tucker Act, of claims founded upon a law of Congress, namely, a revenue law, in respect to which class of cases the jurisdiction of the Court of Claims, under the Tucker Act, has been repeatedly sustained.

In the year 1903, in the case of *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397, 406, 407, 24 Sup. Ct. 376, 378, 48 L. Ed. 496, that court said of an action against the collector of internal revenue to recover taxes illegally exacted:

"This suit was cognizable by the Circuit Court, under the judiciary act of 1887–88, as one arising under both the Constitution and the laws of the United States, 25 Stat. 433, c. 866. It arose under the Constitution, because the plaintiff's cause of action, as disclosed in its statement of demand, has its sanction in that instrument, if it be true, as alleged, that the act of 1898, under which the defendant proceeded when collecting the taxes

in question, is repugnant to the Constitution. And it arose under the laws of the United States because it arose under a statute providing for internal revenue."

(Page 331.) A claim to recover back internal taxes illegally exacted under a misconstruction of the war revenue law of 1898 is a claim founded upon a law of Congress, within the true meaning of the act of March 3, 1887; and it may be enforced by an action directly against the United States under that act after it has been presented to the Commissioner of Internal Revenue, whether it has received his approval or not, and whether it is an action on a contract or an action sounding in tort.

(Page 332.) Is the time for the commencement of such an action to enforce a claim to recover back internal taxes illegally collected limited by the two years fixed by section 3227 of the Revised Statutes (U. S. Comp. St. 1901, p. 2089), or does the time extend to the six years prescribed by section 1 of the act of 1887?

(Pages 332–3.) When the act of 1887 was passed there was, and had been for many years, a code of laws which prescribed the rights and duties of the officers of the United States and of its citizens in the assessment, ascertainment, and collection of internal revenue requisite to support the Government, and in the adjustment of claims for excessive payments. Sections 3220, 3226, and 3227 constituted a part of this system of laws which related to this specific subject. They prescribed and limited the means by which one

might recover back from the United States internal taxes which had been illegally exacted from him. Section 3227 provided that no suit or proceeding for the recovery of any internal tax alleged to have been erroneously or illegally assessed or collected should be maintained in any court unless it was brought within two years next after the cause of action accrued. The adjustment and collection of taxes and of claims for excessive payments on account of such assessments was not the primary subject of the act of 1887. That act was a general law passed for the purpose of conferring jurisdiction of actions upon numerous classes of claims upon certain courts of the United States. It contained a limitation in these words:

"Provided that no suit against the Government of the United States shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made." U. S. Comp. St. 1901, p. 752, c. 1.

Section 16 of the act provides that all laws and parts of laws inconsistent with its provisions are repealed.

If Congress had affirmatively declared by this law that all actions allowed under it might be commenced at any time within six years after their respective causes accrued, there might be some chance for an argument that there was an inconsistency between the limitation of this act and that of section 3227 which would work a repeal of the latter. But there is certainly no repugnancy between a

general law to the effect that no action upon any of several classes of claims shall be brought after six years from the accrual of the cause of action and a statute that no action upon any of a specific class of these claims shall be sustained unless it is commenced within two years of the time when the cause of action arose; and, as there is no inconsistency between the two limitations, the act of 1887 neither repealed nor modified the provision of section 3227.

(Page 333.) All statutes in pari materia are to be read and construed together, as if they formed part of the same statute and were enacted at the same time. Potter, Dwar. St. 145. When the two limitations are read in accordance with the latter rule, all doubt that they are both in force and that they are consistent with each other is instantly dispelled.

Since the year 1872 the time within which such actions could be successfully brought has been limited to two years after the respective causes of action accrued. Act June 6, 1872, c. 315, § 14, 17 Stat. 257; section 3227, Rev. St., 2 U. S. Comp. St. 1901, p. 2089. This class of actions, the class founded on a law of Congress, was not enlarged by the act of 1887, but it remained bounded by the same limits and conditioned by the same words after as before the passage of that act. The action in hand is one of this class. It rests upon a claim founded on a law of Congress, which was presented to the Commissioner of Internal Revenue pursuant to the provisions

> of section 3226. It is an action directly against the United States, and the logical and unavoidable conclusion is that it was barred by the limitation of section 3227, because it was not commenced until more than two years after the cause of action it presents accrued.

The above case squarely supports the Government's contention that the two years' statute of limitations applies.

Chapter 140, act approved March 4, 1915, volume 38, Statutes at Large, page 996, provides:

> Sec. 5. * * * Nor shall said Court of Claims have jurisdiction of any claim which is now barred by the provisions of any law of the United States.

It seems that this statute should also be a bar.

WHEN THE RIGHT TO SUE ACCRUED.

In *Rice* v. *United States*, 122 U. S. 617, the court said:

> A claim first accrues, within the meaning of the statute, when a suit may first be brought upon it.

In *Schwarzchild, etc., Co.* v. *Rucker*, 143 Fed. 656, the court said:

> (Page 658.) The very language which fixes the right to sue within six months, if the commissioner shall fail to act within that time, refers also to the limitation period, and it is evident that the cause of action accrued after the expiration of six months from the time of entering the appeal. I think that this is about as clear as anything can be.

The cause of action in the instant case accrued on May 22, 1914, when the claimant was first given the right to start suit pending the delay in the decision of the Commissioner of Internal Revenue upon the application for a refund (sec. 3226, R. S.; *Schwarzchild & Sulzberger Co.* v. *Rucker, supra; Rice* v. *United States, supra*), hence this suit was barred since it was not filed until July 25, 1918, more than two years after the expiration of the period in which suit could be brought without encountering the prohibition of section 3227, R. S.

It is respectfully submitted that this action has been barred by section 3227, R. S., and by section 5 chapter 140, *supra*, of March 4, 1915, 38 Stat. L. 996, *supra*.

CONCLUSIONS.

Appellant's banking business was carried on in its \$600,000 office building. What part of its building was so occupied does not appear; it might have occupied three-fourths of it so far as the evidence is concerned.

There is nothing in this record to show how much of the money on deposit was converted into interest-bearing securities and placed in appellant's vaults; nine-tenths of it might have been.

This action is barred by section 3227, R. S.

It is barred by section 5, chap. 140, *supra*.

The war revenue act of 1898 was a war measure passed for the purpose of obtaining funds to fight the common enemy. Our Nation's very existence was at stake. Laws were hurriedly drafted and speedily

passed, often by unanimous vote and with little or no debate, to meet financial emergencies.

But they were all passed for the one great purpose, to save our common country.

The effect, naturally and properly, was to separate these great corporations from a very small part of their incomes, to support our citizens who were separated from their homes, their loved ones, their business and property, and sent away to face the shot and shell of the enemy.

In my opinion, these war measures should be interpreted so as to produce the effect desired by Congress; and if any banker is unpatriotic enough to attempt to defeat the intent and purpose of this law, and thus avoid paying his just share toward the war expenses of this Government, which places its protecting arm around him and enables him to accumulate great wealth, this court should inject a little patriotism into his veins by compelling him to bear his small part of the war expenses, while his fellow citizens were freely offering their lives for their country and for his good.

Suppose this tax had been assessed upon the capital and surplus employed in any other branch of its business—its surety, safety deposit, or trustee business.

Take, for instance, its surety business. Appellant could have come into court and made exactly the same showing as it has made in this case. Its capital stock and surplus all invested in securities

and locked in its vaults! And upon its theory of defense the Government could not recover.

And so, with every branch of its business. And if the defense is good in this case, its capital and surplus are beyond the reach of the revenue statute.

This is the only conclusion to which the contention of the appellant herein leads us. It can not be right; it certainly is not just.

Respectfully submitted.

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